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RECAPTURING SUMMARY ADJUDICATION PRINCIPLES IN DISPARATE TREATMENT CASES

*Henry L. Chambers, Jr.**

TABLE OF CONTENTS

I. SUMMARY ADJUDICATION	106
A. SUMMARY JUDGMENT	107
B. JUDGMENT AS A MATTER OF LAW	111
C. QUANTUM OF EVIDENCE SUFFICIENT TO AVOID SUMMARY ADJUDICATION	111
II. DISPARATE TREATMENT DOCTRINE	114
A. PRIMA FACIE CASE	115
B. THE ARTICULATION OF THE LEGITIMATE NONDISCRIMINATORY REASON (LNR).....	117
C. PRETEXT	118
D. THE IMPLICATIONS OF THE CHANGES TO THE MCDONNELL DOUGLAS TEST	122
III. APPLYING SUMMARY ADJUDICATION DOCTRINE TO DISPARATE TREATMENT CLAIMS CORRECTLY	122
A. HYPOTHETICAL EXAMPLE	124
B. THE SUPREME COURT'S VISION	125
C. A FAITHFUL VISION OF THE MCDONNELL DOUGLAS TEST	127
IV. RECLAIMING PRINCIPLE	132
V. CONCLUSION	135

INTRODUCTION

WEAK but winnable cases are supposed to be tried to a jury or to a judge sitting as the factfinder. Summary adjudication—adjudication through summary judgment before trial under Rule 56 of the Federal Rules of Civil Procedure or judgment as a matter

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of law during or after trial under Rule 50¹—is appropriate when a judge determines that a party has no case, i.e., cannot present or has not presented sufficient evidence for a jury to find in her favor, not when a party has a weak case.² This distinction is particularly important in cases where plaintiffs must use inferences to prove difficult propositions, such as in many Title VII disparate treatment cases. A plaintiff in a Title VII disparate treatment case may prevail if she can convince a jury that she was more likely than not the victim of intentional discrimination.³ Proving that an employer intentionally discriminated against an employee be-

1. Summary judgment and judgment as a matter of law have been all but combined, with the distinction between them being their timing in the litigation process. *See* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000); *Weisgram v. Marley*, 528 U.S. 440, 448 (2000); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993); *see also* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 222 (1993) (“The Liberty Lobby Court equated the inquiry a district judge makes when hearing a summary judgment motion to that which the trial court makes when faced with a directed verdict motion.”); Leland Ware, *Inferring Intent from Proof of Pretext: Resolving the Summary Judgment Confusion in Employment Discrimination Cases Alleging Disparate Treatment*, 4 EMP. R. & EMP. POL. J. 37, 41 (2000) (“Summary judgment is the functional equivalent of a directed verdict. The principal difference is that the motion is presented prior to the trial rather than at the close of a party’s evidence.”). However, though the standards for summary judgment and judgment as a matter of law are similar, they arguably are not identical. *See* FED. R. CIV. P. 50, 56; *see also* Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95, 133, 55 (1988) (suggesting that summary judgment is not just a foreshadowing of directed verdict and noting the differences between summary judgment and directed verdict).

2. When a genuine issue of material fact exists, i.e., when both the plaintiff and defendant can present sufficient evidence to support a verdict in their favor, summary adjudication is inappropriate. *See* FED. R. CIV. P. 56(c) (“The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”). When no genuine issue of material fact must be resolved and no dispute regarding the inferences to be drawn from the facts exists, the judge may resolve a case in a summary fashion because there is no role for a factfinder. *See* *Terry v. Elec. Data Sys. Corp.*, 940 F. Supp. 378, 381 (D. Mass. 1996) (describing a genuine issue of material fact: “A ‘genuine’ issue is one that properly can be resolved by a reasonable jury in favor of the nonmoving party; a ‘material’ issue is one that affects the outcome of the suit under the governing law.”).

3. *See* 42 U.S.C. § 2000(e)(2) (1994) (stating that an employer commits an unlawful employment practice when it “discriminate[s] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”). In some, and arguably all cases, the plaintiff need not prove this much. The 1991 Civil Rights Act made plain that Title VII is violated whenever a plaintiff can prove that intentional discrimination was more likely than not a motivating factor for the subject job action. *See* 42 U.S.C.A. § 2000(e)(2)(m) (1998) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). Thus, a prima facie case is arguably merely one that can support the inference that discrimination was a motivating factor for the job action. However, a full examination of this issue is outside of this article’s scope. For a fuller examination of the issue, *see* Henry L. Chambers, Jr., *The Effect of Eliminating Distinctions Among Title VII Disparate Treatment Cases*, 57 SMU L. REV. 83 (2004). Plaintiffs were given the right to a jury trial for some cases by the Civil Rights Act of 1991. *See* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 281 (1994) (noting jury trial right in Title VII cases involving compensatory and punitive damages); *Hicks*, 509 U.S. at 524 (noting that the Civil Rights Act of 1991 provides jury trial for some Title VII cases).

cause of the employee's race, gender, or other attribute can be very difficult in an era in which discrimination is more likely to be veiled than open.⁴ Plaintiffs often must rely on inferences of intentional discrimination from circumstantial evidence to prove their cases. Though circumstantial evidence and direct evidence are equally competent, the use of circumstantial evidence may appear to make a disparate treatment case look weak, even when it is relatively strong.⁵ Over thirty years ago, the Supreme Court recognized that issues of proof in Title VII circumstantial evidence disparate treatment cases were tricky and needed to be resolved in a systematic manner.⁶ In *McDonnell Douglas v. Green*,⁷ the Supreme Court provided a three-part test for analyzing such cases.

The *McDonnell Douglas* test begins with the plaintiff proving a prima facie case, continues with the defendant providing a defense by articulating a legitimate non-discriminatory reason for the job action, and ends with the plaintiff attempting to prove that the defendant's defense is pretextual.⁸ In defining the quantum of evidence that is sufficient to support or require a verdict for the plaintiff,⁹ the test suggests what amount of evidence must be presented to avoid summary adjudication and provides an evidentiary roadmap for judges to use in analyzing circumstantial evidence disparate treatment cases.¹⁰ Summary adjudication was not much of an issue when *McDonnell Douglas* was decided. Then, because all Title VII trials were bench trials, the judge was the ultimate factfinder. However, now that jury trials are available in many Title VII cases, summary adjudication is an issue in disparate treatment cases, for it stops the jury from deciding a case.

In the last decade, just as Title VII jury trials have become common, the Supreme Court has given judges more latitude to dispose of both

4. Indeed, unconscious discrimination may be far more of a problem than conscious discrimination. See, e.g., R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1122 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987); Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1812-13 (2000).

5. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 109-10 (2003) (indicating that circumstantial evidence is competent evidence in employment discrimination cases); *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 n.3 (1983) (noting that a plaintiff may use circumstantial evidence to prove her case).

6. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973).

7. *Id.*

8. For an extended discussion of the *McDonnell Douglas* test, see Henry L. Chambers, Jr., *Getting It Right: Uncertainty and Error in the New Disparate Treatment Paradigm*, 60 ALB. L. REV. 1, 8-11 (1996).

9. See *McDonnell Douglas*, 411 U.S. at 802-07 (noting when a verdict in the plaintiff's favor will be required).

10. Prior to *Hicks*, the key question was whether the test directed judges to find for the plaintiff based on a certain quantum of evidence—proof of falsity. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 504 (1993) ("We granted certiorari to determine whether, in a suit against an employer alleging intentional racial discrimination . . . the trier of fact's rejection of the employer's asserted reasons for its actions mandates a finding for the plaintiff.").

weak and fairly strong disparate treatment cases through summary adjudication, even when Title VII liability is plausible pursuant to the *McDonnell Douglas* test.¹¹ This article explains how the Court's disparate treatment jurisprudence results in the abandonment of the summary adjudication principle that weak but winnable cases should be tried before a jury and suggests that the Court correct its mistake. Part I of this article discusses the Supreme Court's summary adjudication doctrine. Part II discusses the Court's Title VII disparate treatment jurisprudence. Part III reviews how summary adjudication principles should be applied in disparate treatment cases. Part IV suggests how the Court should redefine its disparate treatment jurisprudence to make it consistent with summary adjudication principles.

I. SUMMARY ADJUDICATION

Cases in which a party has no chance of legitimate success at trial should be resolved through summary adjudication—summary judgment or judgment as a matter of law—because they need not be decided by a factfinder. When the facts and the inferences flowing from the facts presented are clear and the verdict is preordained, little is gained by allowing the parties to try the case.¹² Summary judgment before trial is appropriate when there is no genuine issue of material fact, i.e., when the case's result does not hinge on a factual dispute between the parties, and the moving party is entitled to judgment as a matter of law.¹³ Judgment as a matter of law during or after trial is appropriate when no reasonable jury could find for the non-movant based on the evidence presented at trial.¹⁴ Though summary adjudication is supposed to be used only when a

11. For example, *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), gives courts some latitude to summarily adjudicate cases even when the plaintiff has proven its prima facie case and then proved that the defendant's defense is unworthy of belief. Though *Reeves* is an Age Discrimination in Employment Act case, it was analyzed as if it were a Title VII case. See *id.* at 142.

12. Whether a fact is clear or subject to clarity may change over time. See Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 142 (2000) ("We will see, in particular, that certain inquiries deemed factual in 1973—especially indeterminate legal standards such as state of mind or reasonableness—transmuted into questions of law by the end of the study period [1998], and that courts in the later period demanded more rigorous proof to rebut a Rule 56 motion.").

13. See FED. R. CIV. P. 56(c) ("The [summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."). Either party may move for summary judgment. See, e.g., *Nat'l Foreign Trade Council v. Baker*, 26 F. Supp. 2d 287, 293 (D. Mass. 1998) (granting the plaintiff's motion for summary judgment). Indeed, the original vision of summary judgment may have been tilted in favor of plaintiffs bringing summary judgment motions. See Stempel, *supra* note 1, at 137-38 (discussing English summary judgment practice). However, summary adjudication against defendants is more difficult as a practical matter because the defendant rarely has to prove anything to sustain a judgment in its favor. Indeed, for the remainder of this article, we will generally assume that the defendant is the movant and the plaintiff is the non-movant.

14. See FED. R. CIV. P. 50(a)(1) ("If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may

party cannot win, what that means in practical terms has changed over time,¹⁵ as the use of summary adjudication has expanded.¹⁶

A. SUMMARY JUDGMENT

Supreme Court summary judgment jurisprudence can be divided into pre-1986 and post-1986 periods.¹⁷ Before 1986, summary judgment was viewed with caution and was difficult to obtain.¹⁸ However, since the Court decided a trilogy of cases in 1986, summary judgment has become a standard tool that arguably drives the litigation process.¹⁹ Indeed, it is difficult to overestimate the import of summary adjudication.²⁰ Though the Court has claimed that the trilogy merely clarified summary judgment standards,²¹ the trilogy's practical effect on the litigation process has been

grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.”); see also FED. R. CIV. P. 52(c) (relating to judgment as a matter of law in bench trials). Such judgment may be granted either before the submission of a case to a jury or after submission of the case to the jury when a previously filed motion for judgment as a matter of law is renewed. See FED. R. CIV. P. 50(a)(2), (b).

15. At one time, some argued for an extremely stringent standard. See Stempel, *supra* note 1, at 141 (noting Judge Jerome Frank's slightest doubt test, which suggested that a case was inappropriate for summary judgment if there was “slightest doubt as to the facts”). That standard would not be considered an arguable one today.

16. Indeed, the use of summary adjudication may have expanded too much. See Rochelle Cooper Dreyfuss, Book Review, *Galileo's Tribute: Using Medical Evidence in Court*, 95 MICH. L. REV. 2055, 2071 (1997) (noting increased willingness to use judgment as a matter of law in certain medical cases); Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1942 (1998) (suggesting that current use of summary judgment leads to dismissal of cases that should go to trial).

17. There had been disagreements regarding summary judgment well before 1986, notably between Judges Charles Clark and Jerome Frank. See Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 989-90 (1998); Stempel, *supra* note 1, at 140-42; Wald, *supra* note 16, at 1903. However, Supreme Court jurisprudence had settled prior to 1986.

18. See John V. Jansonius, *The Role of Summary Judgment in Employment Litigation*, 4 LAB. LAW. 747, 756 (1988) (noting original judicial resistance to summary judgment); Ware, *supra* note 1, at 44 (“Several circuits fashioned rules in which summary judgment motions were to be denied whenever there was the ‘slightest doubt’ about the merits of such motions.”).

19. See Frank J. Cavaliere, *The Recent “Respectability” of Summary Judgments and Directed Verdicts in Intentional Age Discrimination Cases: ADEA Case Analysis Through the Supreme Court's Summary Judgment “Prism”*, 41 CLEV. ST. L. REV. 103, 107 (1993) (suggesting that the 1986 trilogy of Supreme Court summary judgment cases made summary judgment respectable); Stempel, *supra* note 1, at 99 (“The Court's rhetoric in these three cases changed the tone of judicial perspective on [R]ule 56, creating a climate conducive to more frequent use and granting of the motion.”); Wald, *supra* note 16, at 1913-14 (noting that the 1986 trilogy of cases made summary judgment a viable way to dispose of cases before trial).

20. See Wald, *supra* note 16, at 1897 (“Federal jurisprudence is largely the product of summary judgment in civil cases.”).

21. The Court has held fast to the notion that the trilogy was not an alteration of the summary judgment standard, noting that the new view flowed reasonably from a court's ability to order summary judgment *sua sponte*. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325-26 (1986).

significant.²²

Before 1986, *Adickes v. Kress & Co.*²³ embodied the Supreme Court's summary judgment standard. In *Adickes*, the Court suggested that a grant of summary judgment was limited to cases in which the non-movant's ability to prove her case had been affirmatively foreclosed by the movant.²⁴ In that case, plaintiff Adickes claimed, *inter alia*, that the defendant's employee and an arresting police officer conspired to deprive her of her constitutional rights.²⁵ The defendant moved for summary judgment, arguing that Adickes had presented no evidence to prove that a conspiracy existed.²⁶ The Court rejected the defendant's argument,²⁷ deciding that, without evidence that foreclosed a jury's possible inference that a conspiracy existed, the movant failed to carry its burden under Rule 56;²⁸ the plaintiff was allowed to rely on the allegations of conspiracy in her complaint to demonstrate the existence of a genuine issue of material fact and the inappropriateness of summary judgment.²⁹

In 1986, the Supreme Court substantially altered summary judgment

22. See Stempel, *supra* note 1, at 99 ("These [1986 summary judgment] decisions have influenced lower courts to more readily grant summary judgment and will likely have a ripple effect in those states with procedures modeled after the Federal Rules.").

23. 398 U.S. 144 (1970).

24. *Id.* See Wald, *supra* note 16, at 1907 ("That is more or less the way things stood, with a widespread perception that the burden was on movants to show the absence of genuine issues of material fact in order to obtain summary judgment[.]").

25. The conspiracy supposedly rested on an agreement between the defendant's employee and a policeman. See *Adickes*, 398 U.S. at 152 ("[O]ur cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under §1983 if she can prove that a Kress employee, in the course of employment, and a Hattiesburg policeman somehow reached an understanding to deny Miss Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes.").

26. See *id.* at 153.

27. See *id.* at 159 ("[R]espondent argues that it was incumbent on petitioner to come forward with an affidavit properly asserting the presence of the policeman in the store, if she were to rely on that fact to avoid summary judgment. . . . This argument does not withstand scrutiny[.]").

28. See *id.* at 158-59 ("[W]e conclude that respondent failed to fulfill its initial burden of demonstrating what is a critical element in this aspect of the case—that there was no policeman in the store. If a policeman were present, we think it would be open to a jury, in light of the sequence that followed, to infer from the circumstances that the policeman and a Kress employee had a 'meeting of the minds' and thus reached an understanding that petitioner should be refused service. Because '[o]n summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion,' . . . we think respondent's failure to show there was no policeman in the store requires reversal.") (internal citations omitted).

29. See *id.* at 160 ("If respondent had met its initial burden by, for example, submitting affidavits from the policemen denying their presence in the store at the time in question. Rule 56(e) would then have required petitioner to have done more than simply rely on the contrary allegation in her complaint."). Had the defendant carried its burden, the plaintiff would have had to do more. See *First Nat'l Bank v. Cities Serv.*, 391 U.S. 253, 289 (1968) ("What Rule 56(e) does make clear is that a party cannot rest on the allegations contained in his complaint in opposition to a properly supported summary judgment motion made against him.").

practice.³⁰ That year, the Court decided three cases that remain at the core of the Court's summary judgment doctrine: *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,³¹ *Anderson v. Liberty Lobby, Inc.*,³² and *Celotex Corp. v. Catrett*.³³ As a result of the trilogy, summary judgment—now an oft-used and integral part of the litigation process³⁴—assesses whether the non-movant can prove she can prevail rather than whether the movant can prove that the non-movant cannot prevail.³⁵ Consequently, the summary judgment inquiry now focuses directly on the non-movant's evidence³⁶ and whether it supports allegations made in the pleadings.³⁷

The shift in summary judgment doctrine has resulted in a summary judgment process that looks like a dry run of the trial based on the affida-

30. See McGinley, *supra* note 1, at 222 n.76 (noting that many commentators view the post-trilogy standard as very different from the pre-trilogy standard); Stempel, *supra* note 1, at 157 (“[T]he [Trilogy] Court announced a summary judgment standard that went well beyond even the most favorable previous prong by seeing Rule 56 as the ‘mirror’ of directed verdict rather than as merely informed by Rule 50.”); Wald, *supra* note 16, at 1907 (noting that the 1986 summary judgment cases “radically changed the Rule 56 landscape”). However, arguably the trilogy’s effect has been unclear. See Cavaliere, *supra* note 19, at 144 (“[T]he trilogy cases were both specific enough and yet vague enough to permit the appellate courts to interpret them either as changing the law, or as applying only to the specific types of cases before the court, or as not changing the status quo at all in view of the court’s assertions that judges should not invade the province of the jury.”).

31. 475 U.S. 574 (1986).

32. 477 U.S. 242 (1986).

33. 477 U.S. 317 (1986).

34. See *id.* at 327 (“Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”).

35. See *Ware*, *supra* note 1, at 46 (“*Adickes* was interpreted to mean that to prevail at the summary judgment phase, the moving party was obligated to demonstrate conclusively that the plaintiff could not satisfy her burden of persuasion at the trial. The *Celotex* opinion disagreed with this construction. It held that *Adickes* could not be construed to require the moving party to foreclose every possibility of a factual dispute concerning a claim on which the nonmoving party bore the burden of persuasion. If a motion is made and properly supported, the party with the burden of persuasion at the trial, rather than the summary judgment movant, is obligated to produce evidence demonstrating a genuine issue.”).

36. See *Anderson*, 477 U.S. at 257 (“[T]he plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as the plaintiff has had a full opportunity to conduct discovery.”). Indeed, even allegations supported by affidavit do not adequately answer a proper summary judgment petition unless there is some form of evidence supporting the allegations in the affidavit. See *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888 (1990) (“The object of this provision [Rule 56(e)] is not to replace conclusory allegations of the complaint or the answers with conclusory allegations of an affidavit.”).

37. *Adickes* suggested that, prior to trial, allegations made in pleadings were to be taken as true until they were disproven. See *Adickes*, 398 U.S. at 160 (suggesting that non-movant could rely on allegations in pleadings to support opposition to summary judgment). Conversely, *Celotex* suggests that unsupported allegations made in pleadings arguably cannot be taken as true, and certainly cannot be assumed true in ruling on a summary judgment motion. See *Celotex*, 477 U.S. at 324 (“Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.”).

vits and other papers.³⁸ Now, the issue tends to be whether a plaintiff can demonstrate that she can prove her case at trial.³⁹ The doctrinal shift makes more cases appear ripe for summary judgment.⁴⁰ However, because the process is only supposed to determine whether a non-movant may be able to prevail, courts are supposed to take the evidence that the non-movant presents as true and make all permissible inferences in the non-movant's favor to replicate the decision-making process a factfinder might employ in deciding the case.⁴¹

Formerly, the summary judgment process did not require much of the plaintiff. The litigation process now requires substantial evidence from the plaintiff as she moves from the pleadings stage to trial.⁴² As the Supreme Court has suggested, the pleadings stage is marked by allegations, the summary judgment stage is marked by evidence supporting the allegations, and the trial is marked by proof of the allegations.⁴³ Nonethe-

38. The aggressive use of summary judgment has caused one former judge to suggest that a plaintiff should be ready to prove her case at the pleadings stage, well before the summary judgment stage. See Wald, *supra* note 16, at 1926 (suggesting that given the current state of summary judgment law, plaintiffs should be ready to prove their cases as soon as they are filed rather than taking discovery for granted); see also Paquin v. Fed. Nat'l Mortgage Ass'n, 119 F.3d 23, 25, 28-29 (D.C. Cir. 1997) (noting district court had granted summary judgment before adequate discovery had been required). Of course, this is at odds with how summary judgment ought to work. See Stempel, *supra* note 1, at 139-40 ("Consequently, the better view is that the litigant opposing summary judgment need only demonstrate a sufficient fact dispute to warrant the beginning of trial and need not prove to the court in advance of trial that it would survive a directed verdict motion.").

39. See *Lujan*, 497 U.S. at 888-89 ("[T]he purpose of Rule 56 is to enable a party who believes there is no genuine dispute as to a specific fact essential to the other side's case to demand at least one sworn averment of that fact before the lengthy process of litigation continues."); *Celotex*, 477 U.S. at 322-23 (noting that a party's inability to provide evidence to support an essential element of a case makes the case appropriate for summary adjudication); *Anderson*, 477 U.S. at 248-49 ("More important for present purposes, summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. . . . [T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) ("Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'").

40. The core of summary judgment has always been to resolve cases that had no reason to go to a factfinder before the factfinder was required to hear the case. See *First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968) ("It is true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial."). However, the judgment regarding when a case has no reason to go to a factfinder has changed.

41. See *Anderson*, 477 U.S. at 255 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.").

42. See Wald, *supra* note 16, at 1941 ("[S]ummary judgment is a bridge between dismissal or judgment on the pleadings . . . and full-scale trial[.]").

43. See *Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice. . . . In response to a summary judgment motion, however, the plaintiff can no longer rest on such 'mere allegations,' but

less, how much evidence the non-movant must present to prove that she may prevail at trial is still an issue.

B. JUDGMENT AS A MATTER OF LAW

The standard for judgment as a matter of law mirrors that for summary judgment, though judgment as a matter of law doctrine has been more stable than summary judgment doctrine. Judgment as a matter of law has always been determined after the non-movant has presented evidence and has always focused on whether the evidence the non-movant has actually presented can support a verdict.⁴⁴ The uncertainty inherent in summary judgment regarding what evidence the non-movant can or will produce at trial is not an issue with respect to judgment as a matter of law. Of course, how strong the non-movant's evidence must be to avoid judgment as a matter of law remains an issue.

C. QUANTUM OF EVIDENCE SUFFICIENT TO AVOID SUMMARY ADJUDICATION

To avoid summary adjudication, a plaintiff must demonstrate that she has produced sufficient evidence for a reasonable jury to find in her favor. However, this requirement is subject to two interpretations. The rule can be read to allow evidence that is barely sufficient to support a verdict to defeat summary adjudication ("legal sufficiency") or to require that a plaintiff's evidence be sufficient to convince a reasonable jury that the plaintiff could prevail, even though that evidence may be more than what is indispensable to support a verdict ("sufficiency-plus"). Legal sufficiency arguably is the correct standard because a reasonable jury could logically find for the plaintiff based on evidence minimally sufficient to support a verdict if it believed the plaintiff's evidence and disbelieved the defendant's evidence.⁴⁵ The possibility that a jury could construct a winning case from the non-movant's evidence would appear to require that the jury be allowed to decide the case and that summary adjudication be denied.⁴⁶ A legal sufficiency standard would require only that the plain-

must 'set forth' by affidavit or other evidence 'specific facts,' FED. R. CIV. P. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'").

44. See Stempel, *supra* note 1, at 140 ("To some extent, the purpose of the directed verdict [now judgment as a matter of law] motion is to permit the judge to decide on the basis of the evidence as it develops at trial whether a case is too weak to send to the jury.").

45. Jurors may disbelieve evidence. See *Wright v. West*, 505 U.S. 277, 296 (1992) (noting a jury's right to disbelieve evidence). However, aggressive interpretations of summary judgment may remove the jury's opportunity to disbelieve. See *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) ("At that [summary judgment] stage, if the defendant-official has made a properly supported motion, the plaintiff may not respond simply with general attacks upon the defendant's credibility, but rather must identify affirmative evidence from which a jury could find that the plaintiff has carried his or her burden of proving the pertinent motive.").

46. This is consistent with Rule 50's statement that a "legally sufficient evidentiary basis" may defeat a motion for judgment as a matter of law. See FED. R. CIV. P. 50(a); see

tiff provide evidence sufficient to support any inference indispensable to a verdict and demonstrate that a jury could find in her favor given the level of proof required in a particular type of case.⁴⁷

Conversely, a sufficiency-plus standard focusing on the relative strength of the evidence presented by both parties is another plausible standard for summary adjudication.⁴⁸ A reasonable jury, faced with overwhelming, uncontroverted evidence in the movant's favor and a bare minimum of evidence sufficient to support the non-movant's claim, may seem so unlikely to return a verdict for the non-movant that allowing a court to determine that a reasonable jury faced with all of the evidence in such a case would find for the movant seems reasonable.⁴⁹ However, the way a judge would make such a determination is somewhat troublesome. A sufficiency-plus standard allows judges to decide how high the sufficiency-plus standard should be⁵⁰ and to assess evidence to determine if the non-movant has presented sufficiently strong evidence to meet the standard.⁵¹ Though judges will necessarily make judgment calls about the summary adjudication of cases, those judgments must be bounded by principles rather than pure judicial discretion.⁵²

also Lavender v. Kurn, 327 U.S. 645, 653 (1946) (suggesting that judgment as a matter of law is inappropriate if a jury's verdict can be supported by evidence presented by the non-movant). However, some may argue that legal sufficiency is inconsistent with Rule 50, as there would be no reason for Rule 50 to reference a "reasonable jury" if any jury presented with legally sufficient evidence could find for the nonmovant. See FED. R. CIV. P. 50.

47. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("[W]here the *New York Times* 'clear and convincing' evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant."). When a verdict requires that evidence meet the clear and convincing standard, the non-movant would be required to provide evidence from which a reasonable jury could find that the clear and convincing standard had been met. That the standard can be easily stated does not mean it is easy to discern. See *id.* at 269-71 (Rehnquist, J., dissenting) (noting the extraordinary difficulty accompanying the application of the standard).

48. See *id.* at 251-52 (noting that one-sidedness of evidence can support judgment as a matter of law).

49. Some courts have suggested that evaluation of evidence at the judgment as a matter of law stage must take into account both parties' evidence and the one-sidedness of the evidence. See, e.g., *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 20 (1st Cir. 2002).

50. The standard may be set too high. See *Mollica*, *supra* note 12, at 218 ("The invisible hand of myriad court of appeals and district court decisions have led us to this pass, where federal litigants must struggle mightily just to get to a trial.>").

51. Courts are not supposed to weigh evidence in the colloquial sense. See James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1562 (1995) ("The only 'weighing' that the Court meant to forbid in *Anderson* is the type of comparison one might do in the proverbial scales of justice to decide which of two plausible cases is comparatively stronger."). However, they must assess evidence in some manner to determine whether there appears to be sufficient evidence to sustain a verdict. Judges may also make subtle credibility determinations when deciding summary judgment with widened discretion. See *Anderson*, 477 U.S. at 270 (Rehnquist, J., dissenting) (suggesting the wide range of situations in which judge necessarily makes credibility determinations before deciding a summary judgment motion).

52. Some would argue that judicial discretion is necessary to decide summary adjudication motions properly. See, e.g., Duane, *supra* note 51, at 1556-62 (suggesting that judges in summary judgment are at least allowed to determine if evidence offered is sufficiently plausible for a factfinder to use it to support a verdict).

This concern might suggest that the summary judgment standard should be a legal sufficiency standard and the judgment as a matter of law standard should be a sufficiency-plus standard.⁵³ Though the summary judgment and judgment as a matter of law standards have arguably become the same standard merely exercised at different times in the litigation process,⁵⁴ the difference in timing provides a justification for having different standards.⁵⁵ A court reviewing a motion for judgment as a matter of law has seen how the non-movant's evidence was presented to the jury.⁵⁶ Though applying a sufficiency-plus standard requires that a judge assess evidence and make credibility determinations, at least the judge knows precisely what the jury saw.⁵⁷ At the summary judgment stage, the judge can only guess how evidence that might be presented might affect a jury. A judge cannot make a fully informed decision regarding the relative weight of the parties' evidence as required by a sufficiency-plus standard, particularly given that the court will be forced to consider and credit evidence from the movant that has not been tested through cross-examination.⁵⁸ Limiting the judge to asking whether the non-movant's evidence could minimally support a verdict if believed—a legal sufficiency standard—would seem more appropriate. Nonetheless, it appears that judges deciding summary judgment motions may consider the strength of the movant's evidence in relation to the strength of the non-movant's evidence⁵⁹ to determine the sufficiency of the

53. Cf. Stempel, *supra* note 1, at 144-54 (noting that many prominent commentators treated summary judgment and directed verdict motions as significantly different prior to the summary judgment revolution).

54. See *supra* note 1.

55. Even very similar standards can have different effects when applied in different contexts. See Stempel, *supra* note 1, at 150-51 ("Commentators suggesting a close relationship between the jurisprudence of Rule 56 and that of Rule 50 were also unanimous in noting that the judge should not grant summary judgment even when he or she would be compelled after trial on the instant record to set aside a verdict for the nonmovant and order a new trial or grant judgment n.o.v. The inquiry of the judge at the summary judgment stage was to be limited to ascertaining whether there was any legitimate evidence of record and any rational inferences therefrom that tended to support the nonmovant's claimed version of events and theory of the case. If so, the judge, even one treating the decision as akin to a directed verdict calculus, was bound to deny summary judgment.").

56. However, concerns regarding a court's ability to judge credibility exist even after trial. See Mollica, *supra* note 12, at 207 ("Taken straight, neither judgment as a matter of law nor (by extension) summary judgment can legitimately rest on testimony by interested parties (say, agents or officers of a corporate defendant) averring innocence, because a jury could always reject the witnesses' credibility in the cold, hard light of trial.")

57. See *Anderson*, 477 U.S. at 270 (Rehnquist, J., dissenting) (suggesting that even after a judge has had an opportunity to see witnesses in action, disbelieving them amounts to a credibility determination).

58. This is a problem. See McGinley, *supra* note 1, at 237-41 (suggesting that summary judgment standards have allowed courts to make dispositive credibility assessments at the summary judgment stage); Wald, *supra* note 16, at 1929-30 (suggesting that judges are making clear credibility determinations and deciding disputed issues of fact in summary judgment settings).

59. Of course, this is very difficult to do without making improper credibility determinations. See *U.S. v. Scheffer*, 523 U.S. 303, 336 (1998) (Stevens, J., dissenting) ("It is the function of the jury to make credibility determinations."); *Anderson*, 477 U.S. at 255 (noting that credibility determinations are for the jury to make).

evidence.⁶⁰

Despite arguments to the contrary, the summary adjudication regime is a sufficiency-plus regime. However, even in a sufficiency-plus scheme, summary adjudication is appropriate only when a court believes that a party has an unwinnable case, not merely when a party has a weak case. Though a judge has some discretion in a sufficiency-plus regime, it is not unfettered.⁶¹ Summary adjudication remains appropriate only in those cases where a reasonable jury cannot reasonably find for the non-movant or is required to find for the movant, not merely where it is unlikely to do so.⁶²

II. DISPARATE TREATMENT DOCTRINE

In *McDonnell Douglas v. Green*,⁶³ the Supreme Court formulated a calculus of proof to address evidentiary issues surrounding circumstantial evidence disparate treatment cases.⁶⁴ The three-part test—consisting of the plaintiff's prima facie case, the defendant's articulation of legitimate

60. At least one commentator has suggested a sliding scale approach to summary judgment. See McGinley, *supra* note 1, at 245-55 (suggesting that in disparate treatment cases, the stronger the plaintiff's evidence, the stronger the defendant's evidence should be to grant summary judgment, and the stronger the defendant's evidence, the stronger the plaintiff's evidence should be to avoid summary judgment).

61. The judge must exercise some limited discretion in assessing evidence when deciding summary adjudication motions. A judge must take the evidence that the non-movant presents as true and make reasonable inferences in the non-movant's favor and take the uncontroverted and unimpeached evidence of the movant as true and make reasonable inferences from that evidence. See *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000); see also *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("In ruling upon a Rule 56 motion, 'a District Court must resolve any factual issues of controversy in favor of the non-moving party' only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied."); *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1326 (5th Cir. 1996) ("When evaluating the summary judgment evidence, we resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy; that is, when both parties have submitted evidence of contradictory facts."); Wald, *supra* note 16, at 1906 (noting that "any choice of inferences to be drawn from the undisputed facts was supposed to favor the party opposing the motion [for summary judgment]").

62. For a jury to be required to find for the movant, the movant's evidence should seem so strong that a jury would be unreasonable to disbelieve it. Evidence can be assessed, though arguably not weighed, by the judge. See Duane, *supra* note 51, at 1561 ("[A] federal judge ordered by Justice White to refrain from 'weighing the evidence' is not barred from assessing the evidence to insure that it is at least facially plausible and capable of being accepted by a rational factfinder. That is precisely the same role that White obviously intended to leave open for judges ruling upon summary judgment motions, despite his identical statement in [*Anderson*] that they are not to 'weigh the evidence.'").

63. 411 U.S. 792 (1973).

64. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002) ("[T]he McDonnell Douglas framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case."); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (noting that *McDonnell Douglas* analysis does not apply when the "plaintiff presents direct evidence of discrimination"); Ware, *supra* note 1, at 51 ("The *McDonnell Douglas* analysis assumes that direct evidence of discriminatory intent is not available. It anticipates that the critical proof at trial will consist of circumstantial evidence from which an inference of discrimination can be drawn.").

nondiscriminatory reasons (LNR) and the plaintiff's proof of pretext—provided factfinders a roadmap to liability by gradually eliminating the non-discriminatory causes for a job action⁶⁵ and necessarily defined the quantum of evidence that was sufficient to support a plaintiff's disparate treatment verdict. Because all Title VII trials were bench trials when the *McDonnell Douglas* test was promulgated,⁶⁶ the test specifically provided guidance to judges in their capacity as factfinders. That such guidance was necessary suggests wariness regarding the ability of some trial judges to analyze proof appropriately in disparate treatment cases and also suggests an unwillingness to trust such judges' unstructured determinations regarding the viability of a plaintiff's disparate treatment case. Now that jury trials are available to Title VII plaintiffs, the *McDonnell Douglas* test should provide guidance to judges to determine whether a party has presented sufficient evidence to avoid summary adjudication, with due recognition that weak but winnable cases should be decided by a jury.

A. PRIMA FACIE CASE

Proving a prima facie case is the first step in the *McDonnell Douglas* test.⁶⁷ A prima facie case is any set of facts that permits the factfinder to infer that unlawful discrimination may have caused the subject job action

65. See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981) (“In a Title VII case, the allocation of burdens and the creation of a presumption by the establishment of a prima facie case is intended progressively to sharpen the inquiry into the elusive factual question of intentional discrimination.”); Chambers, *supra* note 8, at 56 n.250 (discussing how the *McDonnell Douglas* test steadily narrows the key issue in circumstantial evidence cases to discrimination). The test assumed that when a member of a traditionally disfavored group is harmed in her employment and literally no reason explains the job action, discrimination is more likely than not the explanation. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (“Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with *some* reason, based his decision on an impermissible consideration such as race.”).

66. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 1977A(c), 105 Stat. 1071, 1073 (codified at 42 U.S.C. § 1981a(c) (2002)) (allowing jury trials for some Title VII cases).

67. The *McDonnell Douglas* Court noted that a prima facie case in a race discrimination case could be proved with the following evidence:

- (i) that . . . [the plaintiff] belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

These facts were sufficient to convince the *McDonnell Douglas* Court, and presumably should have been sufficient to convince all other courts, that plaintiff Green may have been a victim of racial employment discrimination. However, a prima facie case need not resemble that proved in *McDonnell Douglas*. See *Swierkiewicz*, 534 U.S. at 512 (“[T]he precise requirements of a prima facie case can vary depending on the context[.]”); *McDonnell Douglas*, 411 U.S. at 802 n.13 (“The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.”); *Stella v. Mineta*, 284 F.3d 135, 144-45 (D.C. Cir. 2002) (noting that a prima facie case need not be identical to that presented in *McDonnell Douglas*).

in a Title VII disparate treatment case.⁶⁸ However, the *McDonnell Douglas* Court augmented the effect of the prima facie case by attaching a rebuttable presumption of discrimination to it. The presumption has a procedural function, but also reflects an opinion regarding the substantive strength of the prima facie case. Procedurally, the presumption forces the employer to present a defense by requiring a verdict in the plaintiff's favor unless the defendant rebuts the presumption.⁶⁹ Substantively, the presumption suggests that the facts underlying a *McDonnell Douglas* prima facie case strongly support an inference of discrimination.⁷⁰

Though the test's procedural function remains strong, the substantive force of the test has weakened, as some courts have suggested that the prima facie case is more of a formula⁷¹ that procedurally triggers the presumption of discrimination rather than one that logically triggers a strong inference of discrimination.⁷² The result has been to treat the prima facie

68. See *Waters*, 438 U.S. at 576 ("But *McDonnell Douglas* did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under the Act.'"); *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 528 (1993) (Souter, J., dissenting) (noting that under *McDonnell Douglas* and *Burdine* a prima facie case raises an inference of discrimination).

69. See *Burdine*, 450 U.S. at 254 ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.").

70. The presumption is arguably inappropriate unless the prima facie case fairly strongly supports the inference. See 9 JOHN HENRY WIGMORE, EVIDENCE §§ 2487, 2494 (James H. Chadborn ed. 1981) (noting that a prima facie case should be strong to support the presumption). Nonetheless, some would argue that by providing the prima facie case, any substantive component vastly overstates its evidentiary value. See Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2236-37 (1995) (noting the factual and evidentiary weakness of the prima facie case).

71. See *Hicks*, 509 U.S. at 506-07 (treating the prima facie case almost as perfunctory). However, the Court is willing to correct courts that treat the prima facie case as too much of a formula. See *Swierkiewicz*, 534 U.S. at 509-15 (noting that the prima facie case should not be treated as a formula to be pleaded).

72. Indeed, in *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), the Court appears to suggest that a prima facie case could support a rebuttable presumption of discrimination without supporting an inference of discrimination. *Id.* at 254 n.7 ("The phrase 'prima facie case' not only may denote the establishment of a legally mandatory, rebuttable presumption, but also may be used by courts to describe the plaintiff's burden of producing enough evidence to permit the trier of fact to infer the fact at issue. . . . *McDonnell Douglas* should have made it apparent that in the Title VII context we use 'prima facie case' in the former sense."). However, the Court suggested this after noting that the prima facie case supports an inference of discrimination. *Id.* at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous. The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.").

If the *Burdine* Court's view is that a prima facie case does not always not support an inference of discrimination, its view is flawed. A prima facie case that supports a rebuttable presumption may do so only after it is deemed sufficient to support the inference of the fact to be presumed. See 9 JOHN HENRY WIGMORE, EVIDENCE §§ 2487, 2494 (James H. Chadborn ed. 1981) (discussing a prima facie case supporting a presumption: "In other words, the term is thus applied to the stage of the case already noted in a preceding section

case as not particularly persuasive.⁷³ Nonetheless, the Supreme Court has made clear that any inferential value of the facts underlying the prima facie case survives the destruction of the presumption of discrimination.⁷⁴

The facts supporting a prima facie case must, by definition, support an inference of discrimination. A set of facts that does not support an inference of discrimination is not a prima facie case and should be insufficient to allow a plaintiff to avoid summary adjudication, whether or not the defendant provides a defense. Whether the set of facts that sufficed to make a prima facie case in *McDonnell Douglas* would still be deemed sufficient to support an inference of discrimination may be debatable. However, once a court deems that a set of facts establishes a prima facie case, it must be because the prima facie case can support an inference of discrimination and will remain capable of doing so unless a fact underlying the prima facie case is disproved.

B. THE ARTICULATION OF THE LEGITIMATE NONDISCRIMINATORY REASONS (LNR)

A prima facie case triggers a mandatory rebuttable presumption of discrimination and the second part of the *McDonnell Douglas* test—the employer’s articulation of a legitimate, non-discriminatory reason (LNR) for the subject job action.⁷⁵ The rebuttable presumption shifts the burden of producing an explanation for the job action to the employer, but not the burden of proving it.⁷⁶ The articulation of a LNR discharges the employer’s burden of production and rebuts the presumption, thereby eliminating it.⁷⁷ Once the employer provides a defense, the presumption’s

(ante, § 2487) as (c') and (c''), namely, where the proponent, having the burden of proving the issue (i.e., the risk of non-persuasion of the jury), has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence.”). As such, a set of facts constitutes a prima facie case because a factfinder may infer the existence of a case from the facts underlying the prima facie case. There is little reason to believe that the prima facie case in disparate treatment cases would not support an inference of discrimination standing alone, even though it would not require that a factfinder make the inference. See *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) (suggesting that the facts underlying the prima facie case would, standing alone, support an inference of discrimination).

73. The suggestion that the prima facie case was largely procedural may have led to the wholesale attack on the prima facie case’s probative value in *Hicks*, 509 U.S. at 514-23.

74. See *Burdine*, 450 U.S. at 255 n.10 (noting that facts underlying the prima facie case retain factual import through the pretext stage).

75. The LNR must be articulated through admissible evidence. See *id.* at 255 (“[T]he defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff’s rejection.”). In *Burdine*, the testimony of the employer’s decisionmaker was sufficient to rebut the presumption of discrimination. *Id.* at 256-57.

76. See *id.* at 257 (noting that the burden is one of producing evidence, not of persuading the factfinder).

77. See *McDonnell Douglas v. Green*, 411 U.S. 792, 802-03 (1973) (explaining how the articulation of a legitimate, non-discriminatory reason negates the presumption). Of course, the evidence underlying the prima facie case can still be considered in determining whether intentional discrimination occurred. See *Burdine*, 450 U.S. at 255 n.10 (“In saying that the presumption drops from the case, we do not imply that the trier of fact no longer

procedural function is served.⁷⁸

C. PRETEXT

The third part of the *McDonnell Douglas* test—the pretext stage—allows the plaintiff to respond to the employer's LNR.⁷⁹ The *McDonnell Douglas* Court did not define pretext, but directed that the trial judge was required to find for the plaintiff if the LNR was found to be pretextual.⁸⁰ The Court in *Texas Department of Community Affairs v. Burdine*⁸¹ did define pretext, ruling that pretext can be demonstrated either through proof that the defendant's LNR is false (prong one)⁸² or proof that it is more likely than not that discrimination caused the job action (prong two).⁸³ Given that prong two is merely a restatement of Title VII's ultimate burden of proof and that prong one was deemed equivalent to prong two, it would appear that the *Burdine* Court considered proof of falsity to be an independent and sufficient method of proving pretext and sufficient proof to require a verdict for the plaintiff.⁸⁴

However, uncertainty existed in the wake of *Burdine* regarding whether proof of falsity required a verdict for the plaintiff, was mere evidence that could support a finding of intentional discrimination, or was insufficient alone to support a verdict.⁸⁵ That uncertainty was clarified in

may consider evidence previously introduced by the plaintiff to establish a prima facie case. . . . [T]his evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanation is pretextual.”)

78. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-11 (1993) (“The presumption, having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture.”).

79. See *McDonnell Douglas*, 411 U.S. at 804 (“Petitioner's reason for rejection thus suffices to meet the prima facie case, but the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by § 703(a)(1).”).

80. See *id.* at 807 (“On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy.”).

81. *Burdine*, 450 U.S. at 256.

82. Determining that a LNR is actually false may not be invariably sufficient to deem it false, i.e. not the reason the employer credited, for pretext purposes. See, e.g., *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002) (noting that falsity focuses on whether the employer believed the LNR given, not necessarily on whether the reasons given were “objectively false”).

83. See *Burdine*, 450 U.S. at 256 (“This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.”).

84. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 530-33 (1993) (Souter, J., dissenting). Of course, the majority in *Hicks* disagreed with Justice Souter's interpretation. See *id.* at 514-17.

85. For a discussion of issues surrounding the debate, see Melissa A. Essary, *The Dismantling of McDonnell Douglas v. Green: The High Court Muddies the Evidentiary Waters in Circumstantial Discrimination Cases*, 21 PEPP. L. REV. 385 (1994); Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991).

Hicks.⁸⁶ The *Hicks* Court held that proof of falsity may be important circumstantial evidence of intentional discrimination,⁸⁷ but that it does not conclusively prove that intentional discrimination occurred, leaving the analysis of proof to the factfinder.⁸⁸ In addition, it held that though proof of falsity is usually sufficient to support a verdict for the plaintiff, it is insufficient to support a judgment as a matter of law in the plaintiff's favor because, even after falsity has been proven, reasons other than the LNR or discrimination may explain the job action.⁸⁹ The *Hicks* Court's position on the import of proof of falsity collapses *Burdine's* prong one into prong two, but flows directly from its view of the first two stages of the *McDonnell Douglas* test.⁹⁰ Given the *Hicks* Court's views that the prima facie case does not strongly support an inference of discrimination and that the articulation of the LNR is a mere procedural hurdle for the defendant to clear rather than a substantive narrowing of the discrimination inquiry, proof of falsity arguably should not foreclose the factfinder from determining that some non-discriminatory reason other than the LNR may have caused the job action.⁹¹

By minimizing the probative value of the prima facie case and the impact of proof of falsity, the *Hicks* Court also implicitly questioned the factfinder's ability to make the permissible inference of discrimination necessary for judgment in a plaintiff's favor based solely on the prima facie case and proof of falsity.⁹² Though the *Hicks* Court suggested that

86. *Hicks*, 509 U.S. at 514-17.

87. It is no surprise that proof of falsity may still help support an inference of discrimination. See Chambers, *supra* note 8, at 31-36 (discussing the relationship between proof of falsity and proof of intentional discrimination).

88. See *Hicks*, 509 U.S. at 511. Some would say that proof of falsity is extremely probative of discrimination. See Ware, *supra* note 1, at 62 ("Reliance on a false statement is a strong indication that the employers' defense is weak or possibly nonexistent. . . . Discriminatory animus is an inference that arises almost inevitably from a finding that the employer lied about its reason for discharging the plaintiff.").

89. See *Hicks*, 509 U.S. at 522-24.

90. See *id.* at 514-15. It also flows from a desire to protect employers. *Id.* at 514-17. The *Hicks* Court appeared to ask whether discrimination had been proven to be the cause of the job action and appeared intent on protecting employers who might not have discriminated. *Id.* The *Hicks* Court focused on whether the facts underlying the prima facie case coupled with proof of falsity was sufficient to prove that the employer had discriminated rather than on whether such evidence was sufficient to prove that the employer more likely than not discriminated. See *id.* at 513-14 (describing scenario in which an innocent employer might be liable under a pretext-only analysis).

91. See *id.* at 514-15. Rather than searching for certainty that discrimination occurred, the Court should have asked whether the factfinder was required to conclude that it was more likely than not that discrimination caused the job action. With additional analysis, the Court could have determined that proof of falsity necessarily makes it more likely than not that the defendant discriminated, while recognizing that in some cases, an innocent employer might be found liable. See Chambers, *supra* note 8, at 50-51 (noting that proof by a preponderance of the evidence does not seek to guarantee that intentional discrimination occurred before a verdict for the plaintiff is rendered). Cf. Stempel, *supra* note 1, at 110 ("In civil litigation, in which the claimant must make its showings by a preponderance of the evidence rather than beyond a reasonable doubt, circumstantial evidence alone frequently suffices to achieve a claimant's victory.").

92. Defendants took full advantage of this. See Charles F. Thompson, Jr., *Juries Will Decide More Discrimination Cases: An Examination of Reeves v. Sanderson Plumbing*

proof of falsity usually has probative value, its substantive discussion suggested that proof of falsity may, in some cases, have little probative value.⁹³ In the wake of *Hicks*, a circuit split developed as trial courts questioned whether proof of falsity was always sufficient to sustain a verdict and, therefore, always allowed a plaintiff to avoid summary adjudication.⁹⁴ Some courts read *Hicks* as ruling that proof of falsity is almost always sufficient to support a verdict in the plaintiff's favor, though it is clearly insufficient to require one; other courts determined that a prima facie case and proof of falsity alone proved little with respect to intentional discrimination and, therefore, might be insufficient to support a verdict in the plaintiff's favor.⁹⁵

In addressing the circuit split in *Reeves v. Sanderson Plumbing Products*,⁹⁶ the Supreme Court noted that intentional discrimination is generally a fact question⁹⁷ and that proof of falsity can be strongly probative of

Products, Inc., 26 VT. L. REV. 1, 2 (2001) ("It is no exaggeration to suggest that, prior to *Reeves*, the two most important tools for a defendant in an employment discrimination suit were summary judgment and judgment as a matter of law. . . . Even in those cases where the plaintiff could offer some evidence the reason was untrue, the plaintiff often did not have sufficient evidence that the non-discriminatory reason offered was a lie specifically intended to cover discrimination. Therefore, employers were often successful on motion for summary judgment.").

93. It is the apparent lack of probative value that allows courts to require more evidence and raise the amount of proof required to avoid summary adjudication. See *Ware*, *supra* note 1, at 60 ("By insisting that the evidence of pretext must also prove discriminatory intent, rather than focusing on the availability of the inference, the majority in *Hicks* has heightened the plaintiff's evidentiary obligation to a level that is entirely unjustified. Justice Scalia's analysis confused the plaintiff's ultimate burden to prove, by a preponderance of the evidence, that the employer's actions were motivated by discrimination with the obligation to produce the evidence needed to establish a foundation for an inference of intent.").

94. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 140 (2000) ("We granted certiorari . . . to resolve a conflict among the Courts of Appeals as to whether a plaintiff's prima facie case of discrimination . . . combined with sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for its decision, is adequate to sustain a finding of liability for intentional discrimination."); *Ware*, *supra* note 1, at 69 (noting that confusion with respect to how much evidence is sufficient to sustain a verdict flows directly from Justice Scalia's opinion in *Hicks* and its language regarding the elimination of the *McDonnell Douglas* structure after a LNR is articulated).

95. See *Reeves*, 530 U.S. at 140-41 (noting decisions on both sides of the divide).

96. *Reeves* is an Age Discrimination in Employment Act case, but was analyzed under the same structure as a Title VII case. See *id.* at 142 (applying Title VII framework). In *Reeves*, plaintiff *Reeves* was fired by defendant *Sanderson Plumbing Products* after an audit of *Reeves*' department "revealed 'numerous timekeeping errors and misrepresentations.'" *Id.* at 138. At trial, *Reeves* "made a substantial showing that [the employer's] explanation was false." *Id.* at 144. The jury found for *Reeves* based on the evidence of falsity and additional evidence *Reeves* provided suggesting age animus or bias on the part of his supervisor. See *id.* at 152. The trial court denied the defendant's motion for judgment as a matter of law. See *id.* at 139. The Fifth Circuit deemed *Reeves*' evidence of age bias and animus on the part of *Reeves*' supervisor too remote from the employment decision to qualify as proof of age discrimination. *Id.* at 139-40.

97. See *id.* at 146-47 ("There [in *Hicks*] we held that the factfinder's rejection of the employer's legitimate, nondiscriminatory reason for its action does not *compel* judgment for the plaintiff. . . . In reaching this conclusion, however, we reasoned that it is *permissible* for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation.").

intentional discrimination.⁹⁸ However, though a prima facie case coupled with proof of falsity will almost always be sufficient to support a verdict,⁹⁹ in some circumstances, proof of a prima facie case coupled with proof of falsity will not be sufficient to avoid judgment as a matter of law in the defendant's favor.¹⁰⁰ Unfortunately, the *Reeves* Court failed to clarify the *McDonnell Douglas* test or *Hicks*' interpretation of it and engenders continued confusion regarding what factors can support a determination that proof of falsity is insufficient to support a verdict for the plaintiff.¹⁰¹ This allows judges to continue to determine that cases can be summarily adjudicated in the face of a prima facie case and proof of falsity when a fair analysis of the *McDonnell Douglas* test, in light of summary adjudication principles, would allow no such thing.¹⁰²

98. See *id.* at 147 ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive. . . . In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose.").

99. See *id.* at 146 (suggesting that *Hicks* made clear that proof of falsity was generally sufficient to support a verdict); Thompson, *supra* note 92, at 35-36 (noting that the Supreme Court quickly determined that the Fifth Circuit should have allowed the case to be decided by a factfinder). Some have argued that even in the face of the clarity of *Reeves*, some courts will likely not follow it. See, e.g., Trevor K. Ross, *Casenote, Reeves v. Sander-son Plumbing Products: Stemming the Tide of Motions for Summary Judgment and Motions for Judgment as a Matter of Law*, 52 MERCER L. REV. 1549, 1566 (2001) ("Still, old habits die hard with the Federal Rules of Civil Procedure and courts accustomed to routinely granting summary judgment since the Supreme Court's trilogy on the subject may resist whole-hearted or immediate implementation of *Reeves*.").

100. See *Reeves*, 530 U.S. at 148 ("Thus, a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated. This is not to say that such a showing by the plaintiff will *always* be adequate to sustain a jury's finding of liability. Certainly there will be instances where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant's explanation, no rational factfinder could conclude that the action was discriminatory."); see also Thompson, *supra* note 92, at 35 (noting that *Reeves* still allows weak pretext cases to be summarily adjudicated).

101. See *Reeves*, 530 U.S. at 154-55 (Ginsburg, J., concurring) (noting that the Court needs to explain when evidence in addition to a prima facie case and proof of falsity must be presented to sustain a verdict); see also Catherine J. Lanctot, *Secrets and Lies: The Need for a Definitive Rule of Law in Pretext Cases*, 61 LA. L. REV. 539, 546-47 (2001) (noting that neither *Hicks* nor *Reeves* provides a definitive rule that courts are required to follow).

102. Some courts seem to believe *Reeves* is not much of an impediment to granting summary judgment. See, e.g., *Price v. Fed. Express Corp.*, 283 F.3d 715, 720 (5th Cir. 2002) (noting that proof of a prima facie case and proof of pretext may be insufficient to allow a plaintiff to avoid summary judgment); *Zapata-Matos v. Reckitt & Colman, Inc.*, 277 F.3d 40, 47 (1st Cir. 2002) ("The question on summary judgment is whether the slight suggestion of pretext present here, absent other evidence from which discrimination can be inferred, meets plaintiff's ultimate burden. We hold it cannot. This case fits into the category *Reeves* described of plaintiff creating (at best) a weak issue of fact as to pretext on the face of strong independent evidence that no discrimination occurred."); *Schnabel v. Abramson*, 232 F.3d 83, 90 (2d Cir. 2000) ("[W]e conclude that *Reeves* prevents courts from imposing a *per se* rule requiring in all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext. . . . [F]ollowing *Reeves*, we decline to hold that no ADEA defendant may succeed on a summary judgment motion so long as the plaintiff has established a prima facie case and presented evidence of pretext."); *Vadie v. Miss. State Univ.*, 218 F.3d 365, 373-74 n.23 (5th Cir. 2000) (noting that *Reeves* still allows courts to grant summary judgment in the face of a prima facie case coupled with proof of pretext).

D. THE IMPLICATIONS OF THE CHANGES TO THE *McDONNELL DOUGLAS* TEST

The *McDonnell Douglas* test as originally conceived was aimed at judges in their roles as factfinders. It provided a roadmap for judges to find for the plaintiff. The test guarded against judges who would require too much evidence of discriminatory intent before requiring that the defendant provide a defense. Even after the plaintiff and defendant presented their evidence, the test did not leave judges to their own factfinding capabilities, explicitly reminding them that proof of pretext required a verdict for the plaintiff.¹⁰³ Thus, the original *McDonnell Douglas* test was a commentary on the procedural necessity of forcing the employer to present a defense, on the substantive strength of circumstantial evidence in such cases, and on the factfinding ability of trial court judges.¹⁰⁴ However, *Hicks* and *Reeves* seem geared to explaining when a factfinder need not find for a plaintiff. After suggesting that proof of a prima facie case and proof of falsity will not invariably be sufficient to support a verdict, the Court allows judges to summarily adjudicate cases that historically would not have been appropriate for such treatment.¹⁰⁵ This suggests that the minimum amount of evidence necessary to avoid summary adjudication may have increased and is quite problematic. Part III suggests how summary adjudication principles should be applied to disparate treatment claims.

III. APPLYING SUMMARY ADJUDICATION DOCTRINE TO DISPARATE TREATMENT CLAIMS CORRECTLY

The Supreme Court has suggested that the *McDonnell Douglas* test is merely a procedural test that triggers a defendant's obligation to provide a defense and allows the factfinder to analyze a disparate treatment case like any other case.¹⁰⁶ This suggests that summary adjudication should apply to disparate treatment cases, with judges feeling as comfortable summarily adjudicating disparate treatment cases as other types of cases. However, the continued vitality of the *McDonnell Douglas* test suggests that courts should be very careful in granting summary adjudication in

103. See *McDonnell Douglas v. Green*, 411 U.S. 792, 807 (1973) (requiring judgment for plaintiff on proof of pretext).

104. The recent Supreme Court refuses to follow the path in part and in whole. See *Ware supra* note 1, at 58 ("It is this reluctance to believe that discrimination regularly occurs—the perpetrator's perspective—that is infecting the Court's evaluation of civil rights claims. The plaintiff must overcome the Court's underlying skepticism as well as meet the formal burden of proof.").

105. The lack of respect given to proof of falsity is quite odd, given how difficult proving falsity can be. Even when lawyers craft LNRs during discovery to fit the facts of a case, some judges appear ready to fully credit those LNRs. See, e.g., *Zapata-Matos*, 277 F.3d at 47 (focusing on and crediting the reasons for termination first provided at deposition though such reasons had not been provided to the plaintiff at termination or in answer to the complaint).

106. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 521 (1993). Some now deem the *McDonnell Douglas* test largely worthless. See *Malamud, supra* note 70, at 2237 (calling it an "empty ritual").

disparate treatment cases.¹⁰⁷ Courts should not use summary adjudication routinely as a docket control measure in the disparate treatment area,¹⁰⁸ as they arguably do in other areas.¹⁰⁹

Though circumstantial evidence disparate treatment cases involve intensely factual issues of intent¹¹⁰ that should generally be resolved by a

107. The *McDonnell Douglas* test, coupled with summary adjudication principles, ought to significantly limit the use of summary adjudication in disparate treatment cases. See McGinley, *supra* note 1, at 241 (“When a defendant moves for summary judgment, the proper inquiry is whether the defendant has demonstrated that there are insufficient facts from which a jury could reasonably conclude that the defendant discriminated against the plaintiff. Many courts approaching a summary judgment motion in a civil rights case, however, require a plaintiff to prove that she was discriminated against.”).

108. Given the expanding docket of employment discrimination cases, courts may decide to dispose of as many cases as possible before they come to trial. See Jansonius, *supra* note 18, at 747 (noting the explosion of employment discrimination cases on the federal docket); McGinley, *supra* note 1, at 207 (“Advocates of the courts’ aggressive use of summary judgment argue that increased use of summary judgment will eliminate frivolous claims, and thus free up the courts to decide more meritorious claims.”); Ware, *supra* note 1, at 37 (“Employment discrimination cases are occupying a rapidly expanding portion of the dockets of federal district courts.”).

109. See Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 *HOFSTRA L. REV.* 91, 117 (2002) (noting the possible use of summary judgment as a docket control measure); Stempel, *supra* note 1, at 108 (“The Court’s holdings and pro-summary judgment rhetoric were more than information communicated to lower courts about the fine points of an existing rule. Rather, the trio of cases convey a banner message from the Court to judges and attorneys in the federal courts that a tougher summary judgment rule holds the key to easing needlessly mounting pressure on federal court dockets.”). The inappropriateness of eliminating potentially meritorious cases merely because it is inconvenient to try them is manifest. See Wald, *supra* note 16, at 1897-98 (“[R]esearch and observations in my own D.C. Circuit suggest that summary judgment has assumed a much larger role in civil case dispositions than its traditional image portrays or even than the text of Rule 56 would indicate, to the point where fundamental judgments about the value of trials and especially trials by jury may be at stake. A reassessment of Rule 56 and its erratic history may be in order, lest it develop too casually into a stealth weapon for clearing calendars.”).

110. See *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8 (1981) (noting that discrimination is an “elusive factual question”). The Court has noted that discrimination—a mental process—may be difficult to ascertain, but it can be ascertained. See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (“There will seldom be ‘eyewitness’ testimony as to the employer’s mental processes. But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact.”); *Terry v. Elec. Data Sys. Corp.*, 940 F. Supp. 378, 381 (D. Mass. 1996) (noting that even though motive is an issue in many discrimination cases, summary judgment may be appropriate in any particular case); Wald, *supra* note 16, at 1909-10 (noting that the *Liberty Lobby* Court ruled that cases involving the defendant’s intent or motive were no less subject to summary judgment than other cases); Gale Keane Busemeyer, Comment, *Summary Judgment and the ADEA Claimant: Problems and Patterns of Proof*, 21 *CONN. L. REV.* 99, 131 (1988) (noting that *Liberty Lobby* appears to suggest that the existence of issues of intent or motivation does not make summary judgment inappropriate); see also *Crawford-El v. Britton*, 523 U.S. 574, 599 (1998) (noting that deciding summary judgment issues regarding intent will often involve credibility assessments). But see Jana E. Cuellar, Comment, *The Age Discrimination in Employment Act: Handling the Element of Intent in Summary Judgment Motions*, 38 *EMORY L.J.* 523, 562 (1989) (noting that in 1989, there was still support for the notion that “issues of intent, motive, and credibility should always be left to the fact finder because such evidence can be weighed properly only if it is presented through live testimony with full cross-examination”); Jansonius, *supra* note 18, at 758 (noting that judges had been particularly reluctant to use summary judgment in cases involving motive or intent); McGinley, *supra* note 1, at 206 (“Before the summary judgment trilogy, courts had been reluctant to grant summary judgment to a

finder of fact, these cases are not always unsuitable for summary adjudication.¹¹¹ However, when a plaintiff in a disparate treatment case presents evidence that could convince a reasonable factfinder that it is more likely than not¹¹² that unlawful intentional discrimination caused or was a motivating factor in the subject job action,¹¹³ her case should not be summarily adjudicated. Nonetheless, the Court appears to allow trial judges to require far more evidence than should be sufficient to avoid summary adjudication. This Part explains how the Supreme Court analyzes summary adjudication in connection with disparate treatment cases and how it should analyze the issue. To provide context for the discussion, this Part first introduces a hypothetical example.

A. HYPOTHETICAL EXAMPLE

Until his firing two years ago, Fred Jones ("Jones") had been a computer programmer at ABC Computers ("ABC"), where he had worked for three years. After the firing, Jones sued ABC under Title VII, alleging that he was fired because of his race. Jones can demonstrate that he is African American, was qualified for and performed satisfactorily in the programming job from which he was fired, and that the employer replaced him with someone with similar or lesser qualifications.¹¹⁴ ABC claimed Jones was fired because he was twenty minutes late on two days during a critically busy week at ABC and because he pilfered office supplies for his personal use during his tenure at ABC. Jones has asserted that he was not late on the days in question and that he had never taken more than an occasional box of staples or notepad for personal use while he worked at ABC. Jones has not alleged any incidents indicating racial animus or bias on the part of Bob Smith, Jones' supervisor at ABC, who fired him. ABC has moved for summary judgment, claiming that Jones

defendant in a civil rights case where questions of motive, intent and credibility existed."); Ware, *supra* note 1, at 69 n.244 (suggesting that at one time courts did find cases revolving around issues of intent, including employment discrimination cases, to be inappropriate candidates for summary judgment).

111. See *Guillory v. Domtar Indus., Inc.*, 95 F.3d 1320, 1326 (5th Cir. 1996) (noting in non-discrimination case: "Though summary judgment is rarely proper when an issue of intent is involved, the presence of an intent issue does not automatically preclude summary judgment; the case must be evaluated like any other to determine whether a genuine issue of material fact exists."); *Jansonius*, *supra* note 18, at 795 (suggesting that the Supreme Court has legitimized summary judgment to the extent that it ought not be disfavored in resolving employment discrimination litigation).

112. The summary judgment standard specifically considers the level of proof required for the nonmovant to prevail. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (noting that when proof must be clear and convincing, the plaintiff must suggest that his proof is sufficient to convince a reasonable factfinder that his proof is clear and convincing).

113. See *supra* note 3.

114. These facts should support a prima facie case. See *Malacara v. City of Madison*, 224 F.3d 727, 729 (7th Cir. 2000) ("In order to establish a prima facie case of race discrimination Malacara must show: (1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that, despite his qualifications, he was rejected; and (4) the position was given to someone of a different race who had similar or lesser qualifications.").

has not disproved ABC's LNRs and that Jones has presented insufficient evidence to support a verdict in his favor.

B. THE SUPREME COURT'S VISION

The Supreme Court appears to allow trial courts to require that the plaintiff present a substantial amount of evidence to avoid summary judgment. Though the Supreme Court has stated that a *prima facie* case plus evidence of the falsity of an employer's LNR is usually sufficient evidence to avoid summary adjudication, it has noted that it is not always sufficient to do so.¹¹⁵ The Court has noted that proof of falsity can be strong circumstantial evidence of discrimination and that the existence of no other explanation in the face of the *prima facie* case makes intentional discrimination a prime possible motivation for the job action.¹¹⁶ However, without an explanation of why proof of falsity is invariably strong circumstantial evidence, the Court allows proof of falsity to be viewed as weak circumstantial evidence of intentional discrimination at the trial judge's discretion.¹¹⁷ The point is not that all evidence of falsity is strong proof of falsity.¹¹⁸ Rather, it is that proof of falsity of all LNRs means that the defendant has asserted no credible reason for its job action. Therefore, proof of falsity should invariably be treated as strong circumstantial evidence of discrimination.¹¹⁹

By suggesting that this substantial amount of proof is not invariably sufficient to avoid summary adjudication, the Court allows, and arguably encourages, trial courts to require extremely strong evidence before allowing plaintiffs to avoid summary adjudication.¹²⁰ Unsurprisingly, given

115. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000).

116. See *id.* at 147 (noting that once falsity is proven, discrimination may be the most logical remaining reason for the job action); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (noting that if the employer has no credible reason for its action, discrimination is a likely actual reason for the job action).

117. If proof of falsity can, at times, be insufficient for a plaintiff to avoid summary judgment, see *Reeves*, 530 U.S. at 148, it must be because it is weak circumstantial evidence.

118. Of course, the evidence suggesting falsity may be strong in some situations, e.g., if Jones proved that his supervisor fired him though he knew he had not been late for work and knew that Jones had taken no more office supplies than any other worker, and relatively weak in other situations, e.g., if Jones argues that some people who had engaged in the behavior he engaged in had not been fired, though most had. Some courts have suggested that weak evidence of pretext will not be sufficient to allow the plaintiff to avoid summary adjudication. See, e.g., *Reeves*, 530 U.S. at 148; *Walker v. Prudential Prop. & Cas. Ins. Co.*, 286 F.3d 1270, 1277 (11th Cir. 2002); *Zapata-Matos v. Reckitt & Colman, Inc.* 277 F.3d 40, 47 (1st Cir. 2002).

119. Of course, some courts require that proof of falsity itself be strong to be credited at all. See *Walker*, 286 F.3d at 1277 ("Walker and Golub argue that they were each more qualified than Hyland for the Dispatcher position in Orlando. To show pretext, however, Walker and Golub must show more than superior qualifications; rather, they must show that they were so much more qualified that the disparity virtually jumps off the page and slaps one in the face."); *Villiarimo v. Aloha Island Air, Inc.* 281 F.3d 1054, 1062 (9th Cir. 2002) ("Although a plaintiff may rely on circumstantial evidence to show pretext, such evidence must be both specific and substantial.").

120. See, e.g., *Terry v. Elec. Data Sys. Corp.*, 940 F. Supp. 378, 381 (D. Mass. 1996) ("Even in discrimination cases, where motive is often an issue, 'the plaintiff cannot survive summary judgment with 'unsupported allegations and speculations,' but rather must

the Court's view, some courts require proof of differential treatment as a part of a prima facie case¹²¹ and others treat proof of discriminatory bias or animus in the workplace as not probative of discrimination unless it is so closely related to a job action¹²² that it should be viewed essentially as direct proof of discrimination.¹²³ However, requiring or expecting such strong evidence defeats the purpose of the *McDonnell Douglas* test because such requirements very nearly transform these cases into direct evidence cases and raise the amount of evidence necessary to avoid summary adjudication to an unacceptably high level.¹²⁴ Indeed, were our hypothetical plaintiff required to present such evidence, his case would likely be summarily adjudicated even though, as suggested below, a reasonable jury could find in his favor. Without a specific calculus for what proof suffices to support a verdict, the Court allows ad hoc decision-making based on a judge's view of evidentiary strength.¹²⁵

'point to specific facts . . . giving rise to an inference of discriminatory animus.'") (internal citations omitted).

121. See, e.g., *Hilt-Dyson v. City of Chi.*, 282 F.3d 456, 465 (7th Cir. 2002) (requiring differential treatment of similarly situated employee as part of a prima facie case for retaliation); *Patterson v. Avery Dennison Corp.*, 281 F.3d 676, 680 (7th Cir. 2002) (suggesting that proving that similarly situated individuals were treated differently than the plaintiff can be a part of the plaintiff's prima facie case); *Markel v. Bd. of Regents*, 276 F.3d 906, 911 (7th Cir. 2002) ("Under the *McDonnell Douglas* burden shifting approach, in order to establish a prima facie case for gender discrimination, the plaintiff must demonstrate that: (1) she is a member of a protected class; (2) she was performing her job to her employer's legitimate expectations; (3) that in spite of her meeting the legitimate expectations of her employer, she suffered an adverse employment action; and (4) that she was treated less favorably than similarly situated male employees."); see also Ernest F. Lidge, III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 839 (2002) (noting that some courts require evidence of differential treatment to avoid summary judgment).

122. See, e.g., *Markel*, 276 F.3d at 910 (requiring that comments be contemporaneous with job action to support a claim that the job action was biased); *Reeves v. Sanderson Plumbing Prods., Inc.*, 197 F.3d 688, 693 (5th Cir. 1999), *rev'd on other grounds*, 530 U.S. 133 (2000) ("Despite the potentially damning nature of Chestnut's age-related comments, it is clear that these comments were not made in the direct context of Reeves's termination.").

123. See *Gagnon v. Sprint Corp.*, 284 F.3d 839, 848 (8th Cir. 2002) ("Direct evidence is evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude in such a way that the fact finder could infer that the attitude was more likely than not a motivating factor in the employer's decision."). Of course, one of the problems with requiring evidence of this kind is the general difficulty in finding it. See *McGinley*, *supra* note 1, at 217 ("Most plaintiffs will not have access to evidence of motive or intent, should any exist.").

124. See *Ware*, *supra* note 1, at 55 (arguing that requiring proof of discriminatory intent in addition to proving pretext at the summary judgment stage is inappropriate because it confuses the plaintiff's ultimate burden of proving discriminatory intent with the plaintiff's burden to provide evidence sufficient to establish an inference of intent).

125. This is particularly problematic depending on a judge's world view relating to discrimination. See *McGinley*, *supra* note 1, at 231 (claiming that courts often disbelieve disparate treatment plaintiffs while uncritically believing disparate treatment defendants); see also Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791, 795-96 (2002) (noting divergence between what judges find harassing and what reasonable people find harassing).

C. A FAITHFUL VISION OF THE *McDONNELL DOUGLAS* TEST

Contrary to the Court's suggestions, a faithful reading of the *McDonnell Douglas* test suggests that a prima facie case is sufficient to support a judgment for the plaintiff if the facts underlying the prima facie case are unrebutted. The prima facie case is, by definition, a set of facts sufficient to permit a factfinder to infer that discrimination occurred.¹²⁶ Because inferences are supposed to be made in the non-movant's favor at the summary adjudication stage,¹²⁷ evidence supporting facts sufficient to prove a prima facie case would appear sufficient to defeat any summary adjudication motion automatically,¹²⁸ unless the defendant has disproved a fact indispensable to the prima facie case¹²⁹ or has proved that the inference would be unreasonable to make.¹³⁰ Though the articulation of a LNR might appear to rebut or destroy the prima facie case, it does not. It only destroys the presumption of discrimination flowing from the prima facie case,¹³¹ not the possibility that an inference of discrimination can be made based on the facts underlying the prima facie case.¹³²

The plaintiff's burden in a Title VII case is to present sufficient evidence from which a factfinder could infer that discrimination was a motivating factor in the job action.¹³³ This is a lesser standard than proof that discrimination more likely caused the job action and is clearly met by proof of a prima facie case or the facts supporting a prima facie case. Thus, once the facts underlying the prima facie case have been proved, for summary adjudication to be appropriate, the defendant's evidence must destroy the possibility that a reasonable factfinder could infer that

126. See *supra* note 68.

127. See *supra* note 41.

128. See *Ware*, *supra* note 1, at 72 ("It is important to recall that a prima facie case provides an adequate basis for an inference of discrimination if it is left unrebutted. If a nondiscriminatory reason is given in rebuttal, the presumption of discrimination is eliminated but the evidence that established the prima facie case does not evaporate.").

129. If the defendant can directly attack the prima facie case, it is possible that no inference of discrimination will be appropriate and no presumption will be appropriate. See Paul D. Seyferth, *A Roadmap of the Law of Summary Judgment in Disparate Treatment Cases*, 15 LAB. LAW. 251, 255 (1999) ("[A]lthough some courts hold that the proffered reasons for taking an adverse employment action cannot be considered in assessing the sufficiency of plaintiff's prima facie case, other courts are receptive to a direct challenge to their adequacy.").

130. Nonetheless, a prima facie case alone has not generally been deemed sufficient to avoid summary adjudication. See *Grigsby v. Reynolds Metal Co.*, 821 F.2d 590, 595 (11th Cir. 1987) (noting that proof of a prima facie case is not always sufficient to create genuine issue of fact); *McGinley*, *supra* note 1, at 246 ("A defendant articulates a legitimate, non-discriminatory reason for the adverse employment decision by making bare assertions without any documentary proof. A plaintiff responds by presenting a 'bare bones' prima facie case. Most courts would grant the motion for summary judgment."). *But see* *Lowe v. City of Monrovia*, 775 F.2d 998, 1009 (9th Cir. 1986) (suggesting that a prima facie case alone may be enough to avoid summary judgment).

131. The core dispute in *Burdine* concerned whether the defendant had to prove that the LNR was the reason for the job action or whether mere articulation of the LNR was sufficient to rebut the presumption of discrimination. See *Tex. Dep't Cmty. Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Mere articulation was deemed sufficient. *Id.*

132. See *supra* note 77.

133. See *supra* note 3.

discrimination more likely than not was a motivating factor in the job action. This will rarely be the case.¹³⁴

Eliminating the possibility of an inference can be accomplished either by disproving a fact underlying the prima facie case or by proving that the LNR is the reason for the job action to the exclusion of discrimination. A prima facie case implicitly or explicitly requires that the plaintiff be a qualified and competent worker.¹³⁵ An LNR or other evidence that conclusively demonstrates a plaintiff's lack of qualifications or incompetence directly challenges the prima facie case. If a plaintiff is unqualified for the subject job, no prima facie case exists, no inference of discrimination can flow from the remaining facts, and summary adjudication would appear appropriate because a factfinder could not infer discrimination from the plaintiff's termination. However, if a defendant's evidence does not disprove the facts of the prima facie case, it does not eliminate the possible inference of discrimination because a factfinder can infer that discrimination more likely than not caused the job action based on the facts underlying the prima facie case, even when an LNR helps explain or might justify the job action. To destroy the plaintiff's case, the defendant must actually prove that its LNR was *the* reason for the job action.

Finding for a defendant at the summary adjudication stage normally requires that a court overcredit an employer's LNR by conflating the articulation of an LNR with proof of the LNR.¹³⁶ Of course, a factfinder can decline to credit an LNR after it has been articulated.¹³⁷ Nonetheless, there may be circumstances in which taking an uncontroverted LNR as true seems reasonable.¹³⁸ A court might assume that an articulated

134. Nonetheless, even commentators who have been critical of the use of summary judgment in disparate treatment cases give up the notion that a bare prima facie case supports an inference of discrimination in the face of an LNR accompanied by a modicum of evidence. See McGinley, *supra* note 1, at 247-48.

135. Not satisfying an employer's demands may mean an employee has not proven a prima facie case. See *Markel v. Bd. of Regents*, 276 F.3d 906, 911 (7th Cir. 2002) (determining that, by working for a competing company, the plaintiff was not performing her job adequately thereby negating her prima facie case).

136. Because the employer need only articulate the LNR, it is merely the employer's asserted reason for its actions, not proof that the job action was caused by it and not discrimination. See *Burdine*, 450 U.S. at 254 ("The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff."). Nonetheless, weak LNRs can be deemed strong by non-discerning judges. See *Weston-Smith v. Cooley Dickinson Hosp., Inc.*, 282 F.3d 60, 70 (1st Cir. 2002) ("We conclude that Weston-Smith has produced insufficient evidence to take her case to a jury within the *McDonnell Douglas* framework. Although her prima facie case is undisputed, the Hospital's proffered reasons for her termination are plausible and coherent, and neither her criticisms of those reasons nor her independent circumstantial evidence of an improper motive, whether taken apart or together, are sufficient to require a jury trial."). That a LNR is plausible and coherent hardly proves it was the reason for the job action to the exclusion of unlawful discrimination.

137. Indeed, the Court has noted that a strong cross-examination may discredit an employer's LNR. See *Burdine*, 450 U.S. at 255 n.10.

138. Not allowing the court to credit an employer's LNR might be problematic. See Cuellar, *supra* note 110, at 562 (noting that the result of refusing to allow issues of intent, motive or credibility to be decided on summary judgment would be that all cases that

LNR is true because declining to do so may appear to require an improper credibility assessment of the defendant's witness at the summary judgment stage. If the employer's LNR is assumed to be a reason for the firing, requiring evidence rebutting the LNR to avoid summary adjudication might appear sensible. The negation of the LNR might appear to be an essential element of the plaintiff's case because the un rebutted LNR would appear to make viewing discrimination as the cause of the job action inappropriate.¹³⁹

However, the key issue with respect to summary adjudication is not whether the LNR is a reason for the job action, but whether the LNR is the only reason for the firing. That issue should remain a genuine issue of material fact until the defendant conclusively demonstrates that the proffered reason was the only reason for the firing,¹⁴⁰ even if the plaintiff has presented no evidence on the issue.¹⁴¹ A factfinder may refuse to believe the LNR even in the absence of any opposing proof for two reasons.¹⁴² First, the factfinder may not believe the LNR if the witness has an interest in the case's outcome or appears generally untrustworthy.¹⁴³ For example, if the witness is a current employee of the employer or was the employer's decisionmaker or both, he may have an interest in making the LNR appear to have caused the job action when it did not.¹⁴⁴ Second, because a LNR can be almost any reason that might justify a job action, a

reached the prima facie stage would reach the jury). Uncontroverted evidence, even if proffered by the movant, may be taken as true. *See supra* note 61.

139. Of course, an employer's overall defense may be unconvincing even if individual LNRs are plausible explanations for the job action. *See Seyferth, supra* note 129, at 257 (noting that the articulation of multiple conflicting LNRs can lead to a denial of summary judgment).

140. This would leave a very narrow role for summary judgment, but possibly not one particularly at odds with early visions of summary judgment. *See Stempel, supra* note 1, at 135 ("Taken together, these pieces suggest that [Judge] Clark viewed Rule 56 summary judgment as a device for adjudicating cases without trial when the material facts were not contested by either party to the dispute. Clark seems to view the typical record upon which summary judgment may be granted as the virtual equivalent of stipulation by the parties as to the facts.")

141. However, some argue that situations may arise when the possibility of disbelief is insufficient to avoid summary judgment. *See Wald, supra* note 16, at 1904 ("To defend against summary judgment, it would not be enough to point out the possibility of a jury not believing the evidence presented by the proponent; the defendant must produce evidence himself to show there was a factual dispute.")

142. Merely questioning the LNR may discredit them. *See Burdine*, 450 U.S. at 256 n.10 ("Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation."); *see also McGinley, supra* note 1, at 232 (suggesting that a factfinder should be able to infer that a nonsensical reason is a noncredible reason).

143. *See Busemeyer, Comment, supra* note 110, at 131 (noting that the advisory notes to Rule 56 suggest that summary judgment is inappropriate when the credibility of the witness can or should be judged by his demeanor); *Ware, supra* note 1, at 70-71 (suggesting that summary judgment is inappropriate when the inherent credibility of the witness is called into question because he is interested in the outcome); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 269-71 (1986) (Rehnquist, J., dissenting) (cataloging various ways in which a witness' credibility can be challenged).

144. It would be normal for a human resources official or one of the defendant's other employees to provide the LNR through testimony. *See supra* note 75. This is a mirror image of Justice Scalia's suggestion that a disgruntled employee might wish to make an

factfinder might reject a LNR that could justify the defendant's job action but seems too insubstantial to have actually led to the employee's firing. For example, in our hypothetical situation, a reasonable jury might refuse to believe that the plaintiff would have been fired for being a tardy petty pilferer, unless the employer could demonstrate that it had fired others for similar behavior.

The above analysis' suggestion that a plaintiff need not always present evidence for a factfinder to reject a defendant's assertions that its LNR is the only reason for the job action also suggests that a focus on proof of falsity is misguided.¹⁴⁵ Because a plaintiff may prevail if a factfinder believes that intentional discrimination and the LNR combined to cause the job action, falsity of the defendant's LNRs need not be proved for the plaintiff to prevail and should not be required for the plaintiff to avoid summary adjudication.¹⁴⁶ For example, even if the factfinder believed Jones was tardy twice and occasionally took office supplies for personal use, those facts do not foreclose the possibility that the factfinder could infer that discrimination may have contributed to the firing, nor does it necessarily make such an inference unreasonable.¹⁴⁷ If the LNR does not appear severe enough to trigger termination in most situations, a reasonable factfinder could find that the plaintiff's race more likely than not was a motivating factor in the firing.

Notwithstanding the foregoing, given that proof of falsity is not required for a plaintiff to prevail and that it is probative of intentional discrimination, presenting evidence of falsity¹⁴⁸ would seem to guarantee

employer appear liable when it was not. *See St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 513-14 (1993).

145. Nonetheless, various proposals for specifying the evidence necessary to survive summary judgment focus on the pretext stage and proof of falsity. *See, e.g., Seyferth, supra* note 129, at 259-60 (suggesting that courts usually take one of three approaches to sufficiency of evidence at pretext stage: they allow the prima facie case, coupled with a weak LNR, to support pretext, they allow a weak LNR plus "suspicion of mendacity" to support pretext, or they require evidence in addition to proof of falsity to support pretext).

146. One could argue that falsity has been proven once the factfinder fails to believe that the defendant relied solely on the LNR for the job action. However, the Court distinguished between the belief that the LNR is false and the belief that intentional discrimination is a better explanation than the LNR. *See Burdine*, 450 U.S. at 256.

147. The mere possibility that the jury might disbelieve a defendant's evidence does not mean the plaintiff avoids summary judgment merely by suggesting that the factfinder could disbelieve the movant. *See Crawford-El v. Britton*, 523 U.S. 574, 600 (1998); *see also Anderson*, 477 U.S. at 256-57. This usually makes sense, as the plaintiff needs to make her case even if the defendant's evidence is not believed. However, in the context of a disparate treatment case, facts supporting a prima facie case already give the factfinder a reason to infer discrimination. Thus, the LNR is provided to defeat the effect of the prima facie case.

148. At the summary adjudication stage, evidence of falsity must be treated as proof of falsity, given that the non-movant is entitled to have her evidence taken as true and to have reasonable inferences drawn in her favor. *See Goodwin v. Gen. Motors Corp.*, 275 F.3d 1005, 1007 (10th Cir. 2002) (noting that in deciding summary judgment, the court is "required to draw all reasonable inferences in the light most favorable to non-movant"); *Phillips v. Collings*, 256 F.3d 843, 847 (8th Cir. 2001) (noting that in determining judgment as a matter of law the "court must draw all reasonable inferences in favor of the nonmoving party without making credibility assessments or weighing the evidence").

that a plaintiff would avoid summary adjudication.¹⁴⁹ Evidence of falsity gives the factfinder reason to ignore the LNR and is circumstantial evidence of intentional discrimination because it emphasizes that the defendant can produce no credible non-discriminatory reason to support its job action.¹⁵⁰ The evidentiary vacuum with respect to a defense coupled with the prima facie case supports the inference of discrimination.¹⁵¹ However, rather than treat evidence of falsity as additional evidence to make a good case stronger, evidence of falsity has been treated as indispensable to avoid summary adjudication.¹⁵² This is odd, as proof of falsity understandably makes a permissible inference more likely to be made, but it arguably should not turn an inference that is unreasonable to make into one that is reasonable. If it is unreasonable to infer discrimination from the facts underlying the prima facie case, it is unclear what becomes reasonable to infer discrimination just because the employer has asserted an unbelievable LNR.

Whether the plaintiff or defendant should prevail in a disparate treatment case arguably should depend on proof of falsity and other related evidence. However, whether a plaintiff's case should be summarily adjudicated should depend on the facts underlying the prima facie case. A bare, uncontroverted prima facie case may be a weak case relative to many other disparate treatment cases. However, it logically is a winnable case that should be tried to a factfinder, even if the factfinder is likely to find for the defendant.

Though the sufficiency-plus standard provides judges with some discretion to summarily adjudicate extremely weak cases,¹⁵³ it is not a grant of

149. Indeed, some commentators have argued that proof of falsity should always be sufficient for a plaintiff to survive summary judgment. *See, e.g., Ware, supra* note 1, at 74 (“In disparate treatment cases proof of pretext establishes an ample basis for an inference of intent. The circuits that require independent evidence of motive are at the summary judgment stage demanding more proof than Rule 56 requires.”).

150. Some might argue that it is not necessarily the facts supporting the prima facie case that provide the inference, but rather the fact that the defendant has no explanation at all for the job action that supports the inference. *See Furnco Constr. Co. v. Waters*, 438 U.S. 567, 577 (1978) (“A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.”).

151. *See id.* at 576-77.

152. Some courts suggest that a plaintiff must provide evidence to support falsity rather than merely argue that an articulated LNR can be disbelieved. *See Goodwin*, 275 F.3d at 1013 (noting that the plaintiff had to demonstrate that the employer's argument that it could not afford to raise the plaintiff's salary was pretextual); *Ramirez v. Landry's Seafood Inn*, 280 F.3d 577, 577 (6th Cir. 2002) (“To make a showing of pretext sufficient to submit her case to a jury, Ramirez ‘must put forward evidence rebutting each of the nondiscriminatory reasons the employer articulates.’”); *Price v. Fed. Express Corp.*, 283 F.3d 715, 724-25 (5th Cir. 2002). Of course, the argument in *Goodwin* is the type of qualitative argument that should be disbelieved by the factfinder unless the employer can prove it.

153. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.”); *Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) (“[S]ummary judgment serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial.”).

discretion to allow judges to dismiss any relatively weak case.¹⁵⁴ The case must be so weak that any reasonable factfinder could not find for the non-moving party. Nonetheless, some courts may be willing to use summary adjudication in cases where they believe factfinders should reach a particular conclusion rather than only in those cases in which a factfinder must reach a particular conclusion.¹⁵⁵ Unfortunately, the Supreme Court's vision of the *McDonnell Douglas* test makes relatively strong circumstantial evidence cases appear to be better candidates for summary adjudication than they really are.¹⁵⁶ This is problematic because requiring strong circumstantial evidence of discrimination to allow a plaintiff's case to be decided by a factfinder contradicts the notion that summary adjudication focuses on the minimum evidence from which a reasonable factfinder could find for the plaintiff.¹⁵⁷

IV. RECLAIMING PRINCIPLE

Given that all Title VII cases were bench trials when the Court decided *McDonnell Douglas v. Green*,¹⁵⁸ the *McDonnell Douglas* test essentially provided judges a road map to decide disparate treatment cases properly. The directive nature and content of the original *McDonnell Douglas* test implicitly suggested a concern with, or mistrust of, judicial decisionmaking and factfinding capabilities in disparate treatment cases.¹⁵⁹ However,

154. Summary judgment may dispose of cases in which plaintiffs could prevail at trial before such cases get to trial. See McGinley, *supra* note 1, at 256 ("Because of this improper use of the trilogy and McDonnell Douglas/Burdine, Title VII and ADEA plaintiffs have a greater burden defending motions for summary judgment than they would have at trial."); Stempel, *supra* note 1, at 107 (suggesting that the solicitousness of summary judgment has led judges to grant it in inappropriate cases where they are engaging in factfinding better left to factfinders).

155. This is quite problematic. Some commentators have argued that the primacy of aggressive summary judgment enforcement has lessened the effectiveness of employment discrimination laws. See, e.g., McGinley, *supra* note 1, at 206 (noting that the post-1986 vision of summary judgment makes "it easier for defendants to obtain summary judgment in cases of at least arguable discrimination"); Wald, *supra* note 16, at 1938-39 (noting that judges may be particularly apt to grant summary judgment inappropriately in employment discrimination cases).

156. Though more cases appear ripe for summary adjudication, the standard for summary adjudication remains unclear. The *Reeves* standard is not a clear standard because it allows courts room to deem proof of falsity as insufficient to avoid summary adjudication. However, some commentators have suggested that a floating standard is acceptable. See, e.g., Cavaliere, *supra* note 19, at 117 (suggesting that judges require differing levels of proof of discrimination to avoid summary judgment depending on the particular defense of the employment action a defendant proffers); McGinley, *supra* note 1, at 245-46 (advocating a sliding standard based on the strength of the defendant's case). Even the dismissal of very weak cases is somewhat at odds with the view of some judges present at the crafting of the federal summary judgment rule. See Stempel, *supra* note 1, at 140 ("To [Judge] Clark, summary judgment is designed to eliminate cases in which the claimant has 'no case at all,' not to dismiss claims in which the claimant's case appears weak in the eyes of the judge.").

157. Some have suggested that courts are requiring qualitatively substantial proof to avoid summary judgment. See, e.g., Lidge, *supra* note 121, at 832 (noting that some courts have required evidence of differential treatment of similarly situated employees just to support a prima facie case).

158. 411 U.S. 792 (1973).

159. Of course, this is at odds with a post-1986 vision of judges' ability to find facts generally. See Stempel, *supra* note 1, at 158-59 (arguing that the 1986 summary judgment

the expansion of judicial latitude in summary adjudication since 1986, coupled with the Supreme Court's reinterpretation of the *McDonnell Douglas* test, provides trial judges with additional decisionmaking and factfinder latitude. *St. Mary's Honor Center v. Hicks*¹⁶⁰ allows factfinders to decide disparate treatment cases unconstrained by a falsity-only rule that would have required a verdict for the plaintiff in the wake of proof of falsity.¹⁶¹ Because the factfinder in *Hicks* was the trial judge, the ruling might appear to provide judges additional discretion to find facts.¹⁶² However, the discretion that *Hicks* provides is the discretion to allow the factfinder—now often the jury—to determine if intentional discrimination occurred, not the discretion to allow the judge to summarily adjudicate a case.¹⁶³ Given that juries often are now the factfinders in Title VII cases, there is a serious tension between allowing juries to decide cases and allowing judges to summarily adjudicate them in the Title VII area.

Allowing any more judicial discretion than is absolutely necessary is particularly troubling because the exercise of discretion in the context of deciding summary adjudication replaces the judgment of a reasonable factfinder. Implicit in the discretion provided in this structure is the belief that judges and reasonable factfinders share a sufficiently similar world view: namely, that a judge knows how a reasonable factfinder would decide a case. However, there is reason to believe that with respect to some forms of discrimination, judges' views do not always track those of reasonable factfinders.¹⁶⁴ These concerns require hard consideration regarding how to appropriately structure pre-summary adjudication judicial factfinding and reserve sufficient factfinding latitude for juries.

cases provide the judge with far more factfinding abilities under the summary judgment and the directed verdict standards than had previously been the case).

160. 509 U.S. 502 (1993).

161. Although *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000), leaves a small amount of room for courts to adjudicate cases summarily when a prima facie case has been proven and evidence of falsity has been presented, the case clearly notes that the lion's share of such cases are to be decided by factfinders. See *id.* at 146-47.

162. See *Hicks*, 509 U.S. at 513-14 (ruling that the factfinder [who before the 1991 Civil Rights Act was passed was always the judge] who does not believe that intentional discrimination occurred should not be required to find for the plaintiff).

163. Misusing the discretion may defeat legislative goals. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Work Environment Cases*, 34 WAKE FOREST L. REV. 71, 75 (1999) ("Not surprisingly, the practice [of using summary judgment] has returned at a time when Title VII plaintiffs finally have an opportunity for jury trials pursuant to the Civil Rights Act of 1991. No longer are these cases being taken from judicial fact finding, but instead from a jury of the plaintiff's peers. The end result is that plaintiffs are losing their opportunity to test their facts before a jury and are instead again bound by the decision of a single judge on less than a full record.").

164. Judges may have different opinions than other reasonable people regarding what constitutes discrimination. See Beiner, *supra* note 125, at 795-96 ("The average worker's beliefs encompass more behaviors than the courts currently recognize. [Thus, while] reasonable people believe that conduct is sexually harassing . . . [the courts often underestimate the effects of such behaviors and] instead summarily dispose of cases by summary judgment or judgment as a matter of law. Thus, the perceptions of judges on what constitutes harassment to the reasonable person do not always square with what the reasonable person perceives as harassing.").

The Supreme Court has focused on the pretext stage as the place where judges exercise discretion regarding summary adjudication, with proof of falsity being key evidence that judges should consider when deciding whether summary adjudication is appropriate. However, by the time a trial court analyzes evidence of falsity, it is deep into the factfinder's domain. The prima facie case is the place where pre-summary adjudication judicial factfinding should focus and usually end. Though the Supreme Court may no longer agree, by definition, a prima facie case supports an inference of discrimination and, if the facts underlying it have not been disproved, is sufficient to support a verdict for plaintiff.¹⁶⁵ However, if the prima facie case is deemed logically insufficient to allow a factfinder to infer discrimination, the Court should strengthen it to make sure the facts underlying it support an inference that discrimination was a motivating factor in a subject job action. Indeed, fairness requires that the Court fix the prima facie case, as an employer should not be forced to answer a plaintiff's case unless the plaintiff can provide a set of facts that supports an inference of discrimination.

The Court could redefine the prima facie case proactively by defining the facts that may support a prima facie case, as it did in *McDonnell Douglas*, or do so reactively by having trial and appellate courts determine when a set of facts is insufficient to support the necessary inference, overruling them when necessary. The proactive solution is preferable because it provides plaintiffs with more guidance regarding their chances to survive summary adjudication and is more consistent with *McDonnell Douglas*' inherent mistrust of judicial broad discretion in the disparate treatment area. However, because this Supreme Court has shown no inclination to engage employment discrimination issues at this level of specificity and does not appear to mistrust judges who summarily adjudicate disparate treatment cases, reactive guidance is the more likely solution to be chosen, if one is chosen at all. Undoubtedly, focusing on the prima facie case rather than proof of falsity and pretext is unconventional.¹⁶⁶ However, it better addresses the core concern that justifies the *McDonnell Douglas* test—fear of improper judicial fact-finding—and recalls the proper evidentiary significance of a prima facie case—factual support sufficient to sustain an inference of discrimination and support a verdict. This course of action appropriately balances judicial discretion to adjudicate summarily with jury discretion to find facts. Of course, if the Court declines to address the prima facie case, it should take the more conventional route of making clear that evidence of falsity combined with evidence of a prima facie case should always afford a permissible inference of discrimination and be sufficient to support a verdict for the plaintiff, or

165. Some would argue that the prima facie case does not support an inference of discrimination and should be abandoned altogether. See Malamud, *supra* note 70, at 2236-37.

166. Some suggest eliminating the test, *see, e.g.*, Malamud, *supra* note 70, at 2236, altering the amount of evidence plaintiffs must provide in different cases, *see, e.g.*, McGintley, *supra* note 1, at 245-55, or requiring that falsity be invariably sufficient to support a verdict, *see* Lanctot, *supra* note 101, at 540; Ware, *supra* note 1, at 74.

at least specify when such evidence does not support a verdict.¹⁶⁷

Focusing on the prima facie case would not end the exercise of discretion by district court judges, but it would force trial judges to focus their discretion on the proper place. Though the result would be ad hoc decision making by courts regarding whether any particular set of facts supports an inference of discrimination, this is precisely where the summary adjudication debate should occur. Indeed, it is a more honest way to address summary adjudication than asserting that proof of a prima facie case plus proof of falsity does not always logically support an inference of discrimination. In addition, the proposed process might allow courts to refine what sets of facts will suffice to support a verdict to signal to plaintiffs that certain cases need not be brought. This may ease the need to control dockets that arguably has led to the improper expansion of summary adjudication in the disparate treatment area.¹⁶⁸

V. CONCLUSION

Summary adjudication focuses on the minimum evidence necessary to support a verdict in a plaintiff's favor. The *McDonnell Douglas* test is a roadmap for liability that provides the calculus of proof necessary for a plaintiff to prevail in a circumstantial evidence disparate treatment case. Rather than concluding that a proven prima facie case is sufficient to allow a plaintiff to prevail, the Supreme Court has determined that substantially more evidence than that is necessary for the plaintiff to avoid summary adjudication and has set an uncertain standard that appears to afford judges substantial discretion to decide when a disparate treatment plaintiff will have her case decided by a jury.¹⁶⁹ This allows judges to use summary adjudication aggressively as a form of docket control¹⁷⁰ or inappropriately as a reflection of their general dislike of disparate treatment cases.¹⁷¹ Now is the time for the Supreme Court to address the problem by explicitly addressing the *McDonnell Douglas* prima facie case, which by itself should usually be sufficient both to support a plaintiff's verdict and allow the plaintiff to avoid summary adjudication.

167. See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 154-55 (2000) (Ginsburg, J., concurring) (noting the need to indicate precisely when a prima facie case coupled with falsity is insufficient to support a verdict).

168. See *supra* notes 108-09.

169. The results are not surprising. See Wald, *supra* note 16, at 1917 (suggesting that summary judgment may be used too frequently).

170. Unfortunately, courts appear to be using summary judgment for docket control purposes in various discrimination contexts. See Beiner, *supra* note 163, at 73 ("With ever burgeoning court dockets, the federal courts sought a coping strategy to handle the increase in harassment cases. One way to manage them was to look hard at each case during summary proceedings such as motions to dismiss and motions for summary judgment.").

171. See Lancot, *supra* note 101, at 546 ("The antipathy of the lower courts to circumstantial proof of disparate treatment claims may be explained by many factors, including the ideological disposition of many lower court judges, the societal changes in perception of the prevalence of discrimination, and a desire to control the burgeoning dockets of the federal courts.").

